

Saddleback Ridge Wind, LLC // Natural Resource Protection Act
(NRPA) and Site Location of Development Act applications

- Appeal submitted by Rufus Brown on behalf of Friends of Maine's Mountains and other named parties.

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RUFUS E. BROWN

M. THOMASINE BURKE

November 7, 2011

Via Email and U.S. Mail

Susan Lessard, Chair
Board of Environmental Protection
c/o Terry Dawson
17 State House Station
Augusta, Me. 04333

Re: *Appeal of Final Order in the Saddleback Ridge Wind Project
L-25137-24-A-N & L-25137-TG-B-N by Friends of Maine's
Mountains and Other Aggrieved Parties*

Dear Ms. Lessard:

I am enclosing with this letter the appeal of Friends of Maine's Mountains and other aggrieved parties from the Final Order of the Department of Environmental Protection in the referenced case.

Sincerely yours,



Rufus E. Brown

REB/encl.

Gordon Smith, Esq.
Peggy Bensinger, AAG
Client.

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

In Re:

SADDLEBACK RIDGE WIND, LLC)	
Carthage, Canton and Dixfield)	
SADDLEBACK RIDGE WIND PROJECT)	APPEAL OF DEPARTMENT ORDER
L-25137-24-A-N)	BY FRIENDS OF MAINE'S MOUNTAINS
L-25137-TG-B-N (Approval))	AND OTHER AGGRIEVED PARTIES

Pursuant to 38 M.R.S.A. Sections 344.2-A and 341-D.4 and 06-096 CMR ch. 2 (the "DEP Procedural Rules") Section 24.B(1), the Friends of Maine's Mountains ("FMM"), Friends of Saddleback Mountain ("FOSM"), and individual identified below appeal to the Board of Environmental Protection (the "Board") from the Order of the Department of Environmental Protection (the "DEP") dated October 6, 2011 (the "DEP Order"), approving the application of Saddleback Ridge Wind LLC (the "Applicant") for the Saddleback Ridge Wind Project (the "Project"). The Aggrieved Parties request a public hearing before an impartial hearing officer on the grounds that there is credible conflicting technical information regarding the licensing criterion and it is likely that a public hearing will assist the BEP in understanding the evidence. Section 7.B of the DEP Procedural Rules.

AGGRIEVED PARTY STATUS

FMM is a non-profit organization dedicated to protecting the mountain regions of Maine from various threats to their natural and human environments. It believes that one of the most pressing threats to both natural and human values in the area at this time is the inadequately controlled development of wind power plants on mountains, their ridges and in small towns that embody the qualities of life in rural Maine that the State should protect. The principal activities of FMM have been efforts to educate the public about industrial wind power, and to support

grass roots opposition to inappropriately sited projects. FMM objects to the Saddleback Ridge Wind Project based on the likelihood that it will generate excessive noise and on the grounds that it will have an unreasonable visual impact on the surrounding environment, including Mount Blue State Park, and on the mountains popular with climbers that lie north and east of the site. FMM also objects to the permit on the grounds that financial payments were made to a state government agency reviewing the application. FMM's appeal is supported by those individuals who reside near the proposed turbines for the Project and will be affected by noise generated from the Project as well as those who hike and engage in other recreational activities in and around Mount Blue State Park. In addition, FMM claims title to property that abuts the proposed Project site, consisting of 320 acres, including the summit of Saddleback Mountain.

FOSM was organized by local citizens and registered as a non-profit with the State of Maine. It joins Friends of Maine's Mountains and other aggrieved parties in this appeal. FOSM was formed for the purpose of promoting a series of hiking trails connecting Saddleback and Bald Mountains, including the Public Reserve Land in Perkins Township to Mount Blue State Park in order to ensure that future and present generations can benefit from the outdoor and educational opportunities existing within these boundaries. FOSM feels that their concerns about the health impacts caused by improperly sited grid scale wind turbines were not adequately addressed by the DEP. Many of the members are residents and property owners and are aggrieved that they will be negatively impacted by the noise created by these massive turbines. FOSM further objects to the Project due to the adverse scenic impact it will have on Webb Lake and Mt. Blue State Park as well as those areas neglected in the DEP permit application and the associated facilities that were outside the designated impact radius but visible from the many trails, including miles of four-season trails, scenic vistas and summits of mountains such as Mt.

Blue, Tumbledown, Jackson, Little Jackson, Bald, Blueberry, Sugarloaf, Holman, Colonel Holman, Canton and others. FOSM members are greatly concerned that only a few hikers were consulted regarding their visual expectations, public uses and project impact and yet the large group of citizens that spoke at a Public Meeting held in Dixfield was not allowed a Public Hearing for this project by the DEP. FOSM members are residents and frequent users of this area surrounding the Project and feel that it should be protected from the presence of turbines along the ridges.

In addition to FMM and FOSM, the following individuals who own property at the Receiver Points used in the *Noise Impact Study* submitted by the Applicant join in the request for a public hearing. They are: William Kremer (Receiver Point 02); Dennis and Denise McAllister (Receiver Point 03); Will and Teresa Deane (Receiver Point 04); Keith and Karen Potts (Receiver Point 05); David Manca (Receiver Point 07); Kathy and Alan Ackley (Receiver Points 08 & 09); Keith Howard (10); Alice, Troy, Kelly, and Rebecca Barnett (11); Patrick and Roxanne Gorham (Receiver Point 12); Joseph Beggs (Receiver Point 013); Paula Kazarosian (Receiver Points 14 & 15); Dennis Lecourse (Receiver Point 18); Douglas Geis (Receiver Point 22); Jodi Mathers (Receiver Point 26); David Jackson (Receiver Points 28 & 29); Louis, Eric, Mary and Patricia Francis (Receiver Point 30); John Steele (Receiver Point 32); Bill Seymour (Receiver Point 33); and Gene Casey (Receiver Point 34). These individuals are concerned about exposure to excessive noise from the Project that will disturb their wellbeing and potentially caused adverse health effects. They object to the refusal of the DEP to grant their request to a public hearing and claim that doing so violated their constitutional rights to a hearing before an impartial decisionmaker. They also use and enjoy the surrounding area, including Webb Lake and object to the DEP Order's failure to protect the surrounding area from the adverse visual

impacts from the Project. They also object to the Applicant's gifting of cash to the Bureau of Parks and Land.

In addition the appeal is joined by Rand Stowell, who resides at 163 West Side Road in Weld property. This property abuts the Shore of Webb Lake. He uses the lake for swimming, boating, skating and skiing and have since the 1940's. He has a full view of Saddleback Mountain and Saddleback Ridge as it forms the southern boundary of the Webb Lake Valley. For him, the Project will have a significant and dramatic negative impact on the value of my property as a real-estate appraiser has informed me because of the size and the great visibility of the twelve 400 foot plus high turbines. This Project will negatively affect his enjoyment of using Webb Lake.

FINDINGS AND CONCLUSIONS OBJECTED TO

The Aggrieved Parties object to the DEP Order's Findings and Conclusions on Noise (Section 5), DEP Order at 5-16, and Scenic Character (Section 6), DEP Order at 16-23, and Tangible Benefits (Section 25) at 45-46. The Aggrieved Parties also appeal the findings and conclusions related to these subjects.

BASIS FOR THE APPEAL

I. OBJECTIONS TO THE DEP ORDER AS TO NOISE.

The Amended Noise Report submitted on behalf of the Applicant by Resource Systems Group, Inc. ("RSG") on March 17, 2011, accepted in the DEP Order, reveals that the Project does not have a sufficient margin of safety to protect residents living near the Project from excessive noise and the adverse health effects resulting from exposure to excessive noise and diminished property values associated with excessive noise. Table A4 and Figure 19 of the

modified Noise Report reveal that there are 9 non-participating residences bordering the Project which will experience noise at or above 43 dBA. The DEP should not approve a Project with this noise exposure.

The objections of the Aggrieved Parties to the licensing of the proposed Project based on excessive noise were addressed in the December 10, 2010 request for a public hearing to the previous Project Manager, Eric Ham, and they were addressed again in the October 4, 2011 Objection to the Draft DEP Order to the current Project Manager, Mark Margerum. The Aggrieved Parties incorporates by reference all the points in both letters and all the exhibits supporting those letters.

A. Constitutional Objections to the DEP Order.

Several individual Aggrieved Parties have a Property Interest in their residences that entitles them to the protections of the Due Process Clause of the Maine and federal constitutions, both procedurally and the substantively. In order to invoke the protections of Due Process for impairment of property rights, it is not necessary for the property owner to prove that the government has rendered property essentially worthless, as would be in the case for a takings claim. The Takings and the Due Process Clauses are two distinct clauses that are not coterminous regarding the definition of property, with the Takings Clause being more restrictive. *Burns v. P.A. Department of Corrections*, 544 F.3d 279, 285 (3d Cir. 2008). Under the Due Process Clause, a property right is impaired if government actions cause a diminution in the economic value of the claimant's property. *Id.* at 289-91; *see also, Oracle v. Santa Cruz County, Planning Dept.*, 2010 U.S. Dist. LEXIS 43482 (N.D. Cal. May 4, 2010) at * 42; *Sea Grit Restaurant v. Borough of Sea Grit*, 625 F.Supp. 1482, 1490 (D.N.J. 1986). In this case several individual Aggrieved Parties claim the protections of procedural Due Process because the Project licensed

by the DEP has the capacity to diminish the value of their property to the extent that it generates the excessive noise. See the June 8, 2010 Report of McCann Appraisal, LLC for Adams County Illinois, Exhibit 12 to the October 4, 2011 Objections to the Draft DEP Order, and the September 2009, Wind Turbine Impact Study by Appraisal Group One, Exhibit 13 to the October 4, 2011 Objections to the Draft DEP Order. Because the Applicant is under no obligation to compensate adjacent landowners if the noise limits of the existing DEP Noise Rule, 06-096 ch. 375.10, are not exceeded, nearby residents are forced, against their will, to subsidize the wind energy project to the extent that these noise levels allowed are excessive.

The individual Aggrieved Parties also have a Liberty Interest in bodily integrity. *Albright v. Oliver*, 510 U.S. 266, 272 (1994); *Rochin v. California*, 342 U.S. 165 (1952). This Liberty Interest protects residents from government action that allows excessive noise that threatens their health and wellbeing. Based on the record in this case, as described below, there is a substantial risk that the sound levels allowed by the DEP Order will cause nearby residents, including the individual Aggrieved Parties, to suffer adverse health effects and therefore these residents are entitled to the protections of procedural Due Process.

Our Law Court has emphasized that procedurally the Due Process Clause requires “fundamental fairness” to those entitled to it protection. See, *In re Kristy*, 2000 ME 98, ¶6, 752 A.2d 166, 168. In terms of a hearing, “due process requires: notice of the issues, an opportunity to be heard, *the right to introduce evidence and present witnesses*, the right to respond to claims and evidence, *and an impartial factfinder*.” *Id.* at ¶7, 752 A.2d at 169. [Emphasis added.] Any process given as part of an appeal does not validate a process that was unfair at the agency level. See, *Ward v. Village of Monroeville*, 409 U.S. 57, 61-2 (1972). The Aggrieved Petitioners were deprived of Due Process when their request for a public hearing was denied on January 21, 2011

because they were denied the right to present witnesses and the right to have their claims assessed by a neutral and impartial fact finder. The rejection of the Aggrieved Parties' request for a hearing by the DEP Commissioner is sufficient evidence in itself that the DEP was not impartial. The denial letter explained the reason for the DEP's decision as follows: "much of the information you have submitted has been considered by the Department [and rejected] in previous applications and to the extent you have submitted new information I find that it is not sufficient to warrant a public hearing." The message of this denial is that the DEP, which has never held a public hearing in any wind turbine licensing proceeding, has a closed mind on the subject of noise, regardless of the facts involved in a particular license.

In addition, the Due Process Clause includes a substantive component that bars arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *Remo v. Flores*, 507 U.S. 292, 302 (1993); *Washington v. Glucksberg*, 521 U.S. 702, 719 (1993). All federal circuit courts have recognized the substantive Due Process right to protection against government action that impinges on the Liberty Interest of bodily integrity, known as the "state created danger" doctrine. *See Coyne v. Cronin*, 386 F.3d 280, 287 (1st Cir. 2004) (stating that "the Due Process Clause may be implicated where the government affirmatively acts to increase the threat to an individual of third-party private harm."). *See also, Melendez-Garcia v. Sanchez*, 629 F.3d 25, 36 (1st Cir. 2010). The test for such a right is government action that "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In some circumstances, deliberate indifference by officials may satisfy the "shocks the conscience" test. *Id.* at 831. *See also, Patel v. Kent School District*, 2011 U.S.App. LEXIS 14172 (9th Cir. July 11, 2011) at *20 (deliberate indifference exists where government officials disregard the known or obvious consequence of their actions). The DEP's rote approval of wind turbine projects with

total disregard of the health consequences to neighboring residents at noise levels in excess of those determined by the Board to be unsafe just last month qualifies as “deliberate indifference” for purposes of the state created danger doctrine. Likewise, the DEP’s approval of the license for the Project in total disregard of the effect of its decision on the property values of abutting property owners constitutes the type of arbitrary, conscience shocking and oppressive conduct that violates substantive Due Process. *See, Torromeo v. Town of Fremont*, 438 F.3d 113, 118 (1st Cir. 2006); *Doherty v. City of Chicago*, 75 F.3d 318, 325 (7th Cir. 1996); *Adams v. Smith*, 2010 U.S. Dist. LEXIS 90729 (N.D.N.Y. September 1, 2010) at *43. The DEP knows full well that when noise levels at a “protected location,” as defined in the DEP Noise Rule, stand in the way of licensing of a wind energy development because of the noise limits, the developer will purchase a noise easement or purchases the property itself. We know of no project that has failed to obtain licensing because of the need for the developer to acquire property or easements on property because of noise considerations. When the DEP fails to provide an adequate cushion to protect neighboring residents from the effects of noise generated by a wind project, relieving the developer from any need to provide the neighbor of compensation, the net result is that affected neighbor is forced to subsidize the project, which is an outrageously unjust result.

B. Objections to the DEP Order Based on Modeling.

In addition to the constitutional objections, the Aggrieved Parties object that the noise modeling by RSG is not designed to represent the “predictable worst case” impact on adjacent properties to the proposed Project because it does not model sound sources operating during nighttime stable atmospheric conditions with high wind shear above the boundary layer and other conditions that may affect in-flow airstream turbulence. *See*, Report of Richard James dated October 4, 2011, Exhibit 2 to the October 4, 2011 Objections to the DEP Draft Order, at 3.

The requirement for such modeling is contained in Section I (7) (c) of the provisionally adopted Noise Rule Amendments. *See*, Exhibit 22 to the October 4, 2011 Objections to the DEP Draft Order. The Aggrieved Parties recognize, of course, that the proposed Noise Rule Amendments have not been finally adopted and that, even if they were, they would not technically apply to projects in the process of being licensed. Nevertheless, the proposed Noise Rule Amendments represent the best and latest judgment of the Board on the subject following a public hearing and consideration of expert testimony and reports.

If the conditions of high wind shear and other sources of in-flow airstream turbulence had been modeled in the modified Noise Report under a “predictable worst case” scenario, the Project should not have been approved because of SDRS. As explained in FMM’s submissions in the rulemaking proceedings, amplitude modulation is a common complaint by those residing near wind projects that makes wind turbine noise more annoying than other forms of industrial noise. In the rulemaking proceedings, the Board recognized that the existing Noise Rule does not adequately protect against amplitude modulation because that Rule’s definition of SDRS sets a threshold of peak to valley noise spikes too high and because the penalty for SDRS is not properly designed to protect against amplitude modulation given the use of an hourly average as a regulatory measure, absorbing the penalty to the point of insignificance. *See* Section I(4) of the provisional adopted Noise Rule Amendments. *Id.* With the benefit of these insights, the DEP should require applicants to be more conservative in the modeling of projects for SDRS, which has not occurred here. *See*, Exhibit 2 to the October 4, 2011 Objections to the DEP Draft Order at 4.

In addition, even with the change to quieter blades, the modified Noise Report continues to rely on noise reduced operations (“NRO”) for 2 turbines in order for the modeling to comply

with the existing Noise Rule limits for nighttime noise of 45 dBA. The Aggrieved Parties object to the use of NRO in modeling to meet the Noise Rule sound limitations because there has not been an adequate demonstration that NRO reduced power levels will prevent excessive noise when wind turbines are operating in turbulent conditions. *See*, Exhibit 2 to the October 4, 2011 Objections to the DEP Draft Order at 4. Also we object to NRO in modeling because NRO is the first measure used for mitigation in response to excessive noise experienced in actual operations. There is a limit to how much NRO can be used because it maxes out at NRO 4. Therefore, by using NRO to meet the Noise Rule at the licensing stage, a wind power developer limits its ability to use NRO later, once a project begins operations, as a mitigation tool. *Id.*

C. Objections to the DEP Order Based on Health Concerns.

As noted above, 9 of the receiver points in the modified Noise Report are predicted to experience noise from the proposed Project during nighttime operations at or exceeding 43 dBA. Under the provisionally adopted Noise Rule Amendments, these noise levels would be considered excessive based on maximum nighttime limits of 42 dBA. Exhibit 22 to the October 4, 2011 Objections to the Draft DEP Order. Again, we recognize that the provisionally adopted Noise Rule Amendments do not apply to this Project, but the Board adopted these limits provisionally based on the latest health based reports and studies. As explained in the Basis Statement in the provisionally adopted Noise Rule Amendment, “[t]his rule takes into account the increased knowledge concerning noise generated by wind turbine development since the [original] rule was adopted” and that it is intended to “protect the environment and existing uses of the areas surrounding the developments.” Exhibit 22 to the October 4, 2011 Objections to the Draft DEP Order, Basis Statement, at 9. The Supplemental Basis Statement and Response to Comments prepared for the September 15 Board meeting, Exhibit 23 to the October 4, 2011

Objections to the Draft DEP Order, further explains at 6- 7 that:

The available data demonstrates that persons living near existing wind energy developments with actual sound level measurements near 45 dBA as at Vinalhaven are experiencing adverse effects. A decrease in the sound level limit from 45 dBA to 42 dBA hourly average nighttime limit should be a perceptible difference in sound level and as protective as the WHO annual night noise guideline.

Accordingly, the DEP should take the health based limits of the provisionally adopted Noise Rule Amendments into consideration as authorized by Section 10E. of the existing Noise Rule, which provides:

The Board may, as a term or condition of approval, establish any reasonable requirement to ensure that the developer has made adequate provision for the control of noise from the development and to reduce the impact of noise on protected locations.

We have progressed beyond the point that the DEP should routinely approve wind development projects modeled at 45 dBA without consideration of the health effects of doing so based on the tired arguments of wind developers that have not withstood scrutiny. *See*, Exhibit 2 to the October 4, 2011 Objections to the DEP Draft Order at 1-3.

The Aggrieved Parties' December 10, 2010 filing with the DEP in support of a public hearing, incorporated herein by reference, addressed this issue at pages 13-16. The studies included in that filing included the Affidavit of Michael Nissenbaum, (Exhibit 1 to the December 1, 2010 filing) concluding that 14 of the receptor sites at the Saddleback Ridge Project will experience adverse health effects from the Project, including sleep disturbance and adverse health effects caused by sleep disturbance, and other receptor sites would be exposed to an unknown quantity of risk of adverse health effects. Dr. Nissenbaum also presented to the Board in the rulemaking hearing for the Noise Rule Amendments giving further support for the exposure to adverse health effects for residents adjoining wind projects at distances like those

documented for Saddleback Ridge in the modified Noise Report. *See*, Exhibit 4 to the October 4, 2011 Objections to the Draft DEP Order (Petitioners' Post-Hearing Comments) at 2-4. In addition, since the rulemaking hearings, Dr. Nissenbaum's study of Mars Hill and Vinalhaven for health risks for those adjacent to wind turbine projects has been published. *See*, M. Nissenbaum, J. Aramini, and C. Hanning, "Adverse health Effects of Industrial Wind Turbines: A Preliminary Report, 10th International Conference of Public Health Problem (2011)," Exhibit 11 to the October 4, 2011 Objections of the Draft Order. This paper reports on the "first controlled study of the effects of IWT noise on sleep and health, show[ing] that those living within 1.4 km of IWT have suffered sleep disruption which is sufficiently severe as to affect their daytime functioning and mental health." *Id.* at 4.

In the DEP Order at 10 explaining DEP's rejection of the arguments of the Aggrieved Parties on noise, references are made to the testimony of Dr. Dora Mills at the July 7, 2011 Board rulemaking hearing and the October 2009 report of Exponent, Inc. for the Wisconsin Public Service Commission and the December 2009 report prepared by the American Wind Energy Association and the Canadian Wind Energy Association (the "AWEA/CWEA panel") that wind energy noise does not "directly cause" health problems. This point was completely discredited at the Board public hearing on the proposed Noise Rule Amendments. Dr. Nissenbaum explained that annoyance is one of the root causes of sleep disturbance and secondary adverse health effects suffered. In other words, wind turbine noise *indirectly* causes adverse health effects if too loud. *See*, Exhibit 4 to the October 4, 2011 Objections to the Draft DEP Order at 2-3. Nissenbaum's opinion on indirect effects are supported by the *WHO Guidelines for Nighttime Noise in Europe* (2009), as shown by the chart from WHO reproduced as Exhibit C to Dr. Nissenbaum's testimony before the Board in the rulemaking proceedings.

Exhibit 1, AR-05, to the October 4, 2011 Objections to the Draft DEP Order. More pointedly, Dr. McCunney, one of the principal authors of the AWEA/CWEA report referenced in the DEP Order, verified at the July 7 Board hearing what he had earlier testified in Vermont proceedings on the health implications of wind turbine noise. In the Vermont proceedings, Dr. McCunney acknowledged that annoyance from wind turbine noise “may cause recognized medical disorders such as sleep deprivation” and that “health impacts associated with sleep disturbance may be experienced at noise levels below 45 dBA.” Exhibit 1, AR-108, to the October 4, 2011 Objections to the Draft DEP Order. At the Board rulemaking hearings, he testified that he agreed with Dr. Nissenbaum that “*there is no question*” that annoyance leads to stress which over time leads to sleep disturbances that can have adverse health effects. Exhibit 4 to the October 4, 2011 Objections to the Draft DEP Order at 5-7; Exhibit 5 to the October 4, 2011 Objections to the Draft DEP Order at 4-5. He said again, “there is no question that annoyance leads to sleep disturbance”, that “sleep disturbance starts at 40 dB.” *Id.* Dr. McCunney also did not question his Vermont testimony that if it were his home, he would want “the noise level [to] be kept below 35 decibels, maybe 40.” *Id.* Consistent with this testimony at the Board hearing he did not claim the absence of adverse health effects for noise in excess of 40 dBA; he limited his comments about health effects for levels below 40 dBA. *Id.*

The DEP Order at 10 also cites the AWEA/CWEA report for the proposition that “sounds emitted by wind turbines are not unique.” The international literature on this subject conclusively establishes the falsity of this statement. *See*, Exhibit 1, AR-03, to the October 4, 2011 Objections to the Draft DEP Order (Statement of Position by Petitioners and Friends of Maine’s Mountains before the BEP rulemaking proceedings) at 2-8. More importantly, the Board was clear in its deliberations of the provisionally adopted Noise Rule Amendments, as was the DEP itself, that

wind turbine noise is different from other kinds of industrial noise and therefore needs focused treatment separate from the regulation of other sources of industrial noise.

The DEP Order at 10 also states that “[a]nnoyance regarding the wind turbines is an elusive factor that could underlie a majority of the health complaints being attributed to wind turbine operations.” This is another example of a false assertion discredited at the Board rulemaking hearings. As Dr. Nissenbaum explained in his testimony before the Board in the rulemaking proceedings, and as the *WHO Nighttime Guidelines* and the wind industry’s medical spokesman, Dr. McCunney confirmed, annoyance is a concept imbedded in research as a cause of sleep disturbance leading to adverse health effects. McCunney testified at the rulemaking hearing:

I agree with the presenters, noise can certainly affect sleep, and certainly if sleep is affected, that can lead to health effects. In fact in my view there can be a cascade. *Annoyance, if protracted, can clearly lead to stress; stress, if protracted, can lead to sleep disturbance; sleep disturbance, if protracted can clearly lead to health problems. There is no question about that*

Exhibit 1 to the October 4, 2011 Objections to the Draft DEP Order (Public Rulemaking Hearing Transcript) at 150. [Emphasis added.] In the peer reviewed article by H. Moeller & C. Pedersen, *Low Frequency Noise From Large Wind Turbines*, 129 J. Acoust. Soc. Am. 3727, 3734-5 (June 2011), Exhibit 1, AR-42, to the October 4, 2011 Objections to the Draft Order, it is stated that:

Pedersen & Wade have shown that around [35 dB] the percentage of highly annoyed persons increases above 5%, and the percentage of annoyed persons increases above 10% [citing a 2009 publication of Pedersen relied upon by Dr. McCunney in his testimony]. Pedersen and Nielsen recommended a minimum distance to neighbors so that wind turbine noise would be below 33-38 dB. A limit of 35 dB is used for wind turbines, e.g., in Sweden for quiet areas. *Thus 35 dB seems as a very reasonable limit for wind turbine noise.* It is also the limit that applies in Denmark in open residential areas (night) and recreational

areas (evening, night and weekend for industrial noise (but not for wind turbine noise). [Emphasis added].

Attempts to pass off “annoyance” in its colloquial meaning as an insignificant bother can no longer be regarded as credible in the context of wind turbine noise.

This appeal is the first one to reach the Board on wind turbine project licensing since the rulemaking proceedings on the proposed Noise Rule Amendments last summer. The Board’s decision will be a precedent setting for this reason. This appeal presents the most compelling occasion yet for the Board to exercise the authority under Section 10.E of the Noise Rule to protect the citizens residing near the proposed Project from excessive noise based on the enhanced level of its understanding of the health risks of excessive wind turbine noise.

II. OBJECTIONS TO THE DEP ORDER BASED ON VISUAL IMPACT.

A. The Evaluation Criteria for Assessing Visual Impact under the Wind Energy Act Requires Rulemaking to Avoid an Unconstitutional Delegation of Legislative Discretion.

The evaluation criteria for determining whether a proposed wind energy development project will have an unreasonable adverse effect on the scenic character and existing uses of scenic resources of state or national significance in accordance with 35-A M.R.S.A. §3452.1 are set forth in subsection 3 of the statute as follows:

3. Evaluation criteria. In making its determination pursuant to subsection 1...the primary siting authority shall consider:

- A. The significance of the potentially affected scenic resource of state or national significance;
- B. The existing character of the surrounding area;
- C. The expectations of the typical viewer;
- D. The expedited wind energy development's purpose and the context of the proposed activity;

E. The extent, nature and duration of potentially affected public uses of the scenic resource of state or national significance and the potential effect of the generating facilities' presence on the public's continued use and enjoyment of the scenic resource of state or national significance; and

F. The scope and scale of the potential effect of views of the generating facilities on the scenic resource of state or national significance, including but not limited to issues related to the number and extent of turbines visible from the scenic resource of state or national significance, the distance from the scenic resource of state or national significance and the effect of prominent features of the development on the landscape.

These criteria are so vague that there can be no meaningful review by the judiciary as to whether the agency, either the DEP or Land Use Regulatory Commission ("LURC"), has fulfilled the legislative purposes of the Wind Energy Act or has exceeded the bounds of allowable discretion in the licensing of projects.

Legislative delegation of authority to an administrative agency (here the DEP and LURC) in such broad, sweeping terms, without the protections afforded by agency rulemaking in accordance with the Maine Administrative Procedure Act rendering the delegation of authority more specific, contravene the Separation of Powers Doctrine in Article III of our Maine Constitution. ¹*See, Northeast Occupational Exchange, Inc. v. State of Maine*, 540 A.2d 1115 (Me. 1988), which stated:

To evaluate the constitutionality of a legislative delegation of authority to an administrative agency, we review the legislation in context to see whether the legislation contains:

'sufficient standards -- specific or generalized, explicit or implicit [...]' to guide the agency in its exercise of authority, so that (1) regulation can proceed in accordance with basic policy determinations made by those who represent the electorate and

¹ The Separation of Powers Doctrine is also inherent in the United States Constitution as well, but is "much more rigorous" in its application under the Maine constitution. *New England Whitewater Center v. Commissioner of Inland Fisheries and Wildlife*, 2000 ME 66, ¶9, 748 A.2d 1009, 1013.

(2) some safeguard is provided to assist in preventing arbitrariness in the exercise of power.

Id. at 1116, quoting from *Maine School Administrative Dist. No. 15 v. Reynolds*, 413 A.2d 523, 529 (Me. 1980) (quoting *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 387, 400 (Me. 1973)). The Court explained further that agency rulemaking in accordance with the Maine Administrative Procedure Act providing specificity can “protect against an abuse of discretion by the agency and may be considered in resolving the constitutionality of the delegation of power.” *Id.* at 1117. These standards were adopted in the more recent decision of the Law Court in *Uliano v. Board of Environmental Protection*, 2009 ME 89, 977 A.2d 400, where the scenic and aesthetic use standards in 38 M.R.S.A. §480-D(1) were challenged for lack of quantitative standards susceptible to a logical construction. In this case too, the Law Court looked to the procedural protections of the Administrative Procedure Act as a factor to counterbalance the vagueness of legislative delegation. It commented that “by providing significant protection against abuses of discretion by the Board in exercising its rule-making authority, the requirement that the Board promulgate rules subject to the Maine Administrative Procedure Act compensates ‘substantially for the want of precise [legislative] guidelines.’” *Id.* at ¶28, 977 A.2d at 411, quoting from *Northeast Occupational Exchange, Inc., supra*, 540 A.2d at 1117.

It is significant that the need for further specificity in the scenic evaluation criteria enacted in the Wind Energy Act was recognized by the drafters of the statute. In Attachment M (“Approach to Scenic Impacts”) to the *Report of the Governor’s Task Force on Wind Power Development* (http://www.maine.gov/doc/mfs/windpower/pubs/report/wind_power_task_force_rpt_final_021408.pdf), containing the draft language for the evaluation criteria enacted into Section 3452.3, the

Governor's Task Force stated clearly that the DEP and LURC "*shall* adopt guidance to implement this approach." [Emphasis added.] A "guidance" is not sufficient to save a vaguely worded delegation from constitutional infirmity because it does not limit the exercise of unlimited discretion by force of law. However, the fact that the drafters of the evaluation criteria recognized that further specificity would be required to implement the draft language constitutes compelling evidence of the need for administrative rules to limit discretion.

There have been no regulations promulgated by the DEP (or LURC) to implement and render more specific the evaluation criteria set forth in Section 3452.3 for determining unreasonable adverse impact of wind projects on protected scenic resources and uses in accordance with the standards enacted in the Wind Energy Act. There is nothing to confine the discretion of the DEP in ruling on the scenic impact issues presented by project.

Indeed government agencies and their consultants working on this very Project application acknowledged the need for further guidance as to how to apply the evaluation criteria. Alan Stearns, then Deputy Director of the Maine Bureau of Parks and Lands, was asked for his agency's input on the scenic impact of the Saddleback Ridge Project on protected public lands. In a December 9, 2010 email to the DEP Project Manager, Stearns wrote that without more guidance, "BPL's ability to comment on the 'reasonableness' of scenic impacts is nearly impossible, or in the alternative fully subjective." Bureau of Parks and Land also urged DEP, with respect to scenic impact to "listen closely to public input, since public input on 'reasonableness' is as valuable as agency input."

The comments of Alan Stearns have been validated by the DEP itself. The criteria for evaluating the scenic impact from wind projects are so unworkable that the DEP (as well as LURC) has re-delegated the task of scrutinizing the visual impact analysis in applications for

wind energy developments to a consultant, James Palmer, from Scenic Quality Consultants, Burlington Vermont. Palmer prepared a *Review of the Saddleback Ridge Wind Project Visual Impact Assessment* on January 21, 2011, which is part of the record in this case. In his *Review* at 51-2 Palmer observes:

The Wind Energy Act's evaluation criteria are so succinct as to be somewhat ambiguous. **The primary permitting authorities should further refine the evaluation so they are unambiguously understood, accurately applied and usefully interpreted. This should include identifying indicator thresholds that distinguish between Unreasonable Adverse, Adverse, and Not Adverse scenic impacts.** [Emphasis original]

See similar remarks in Palmer's *Review* at 20.

Without the benefit of concrete legislative direction on evaluation criteria, or even the benefit of agency rulemaking by the DEP or LURC and without even official guidelines from either agency, Palmer has forged ahead on his own to particularize the evaluation criteria, which is set forth in his *Review* of the Applicant's Visual Impact Analysis dated October 2010 prepared by Terrence J. DeWan & Associates for Saddleback Ridge (the "VIA") and subsequently been adopted by LURC as an informal rule and applied as Appendix 1 in the Bull Hill Wind Project Review, dated March 21, 2011

(http://www.maine.gov/doc/lurc/projects/Windpower/FirstWind/BlueSkyEast/DP4886/Application/LURCconsultant_ScenicReview.pdf), the Highland Wind Project Review, dated April 11, 2011

(<http://www.maine.gov/doc/lurc/projects/Windpower/HighlandWind/Resubmittal/Palmer.pdf>)

and the Bowers Wind Project Review, dated June 3, 2011

(<http://www.maine.gov/doc/lurc/projects/Windpower/FirstWind/Champlain/Development/Application/ReviewComments/PalmerRevisedVIAComments.pdf>).

The "Palmer Rules" are set forth in his *Review* at 2-7 in these proceedings, especially 3-4

where he interprets the 6 criterion set forth in 35-A M.R.S.A. §3452.3. For the criterion “significance of the affected scenic resource” (Criterion A) Palmer acknowledges that the “Wind Energy Act does not explicitly describe how significance should be considered.” Palmer speculates on various possibilities and then settles on proposition that “[s]ometimes the level of significance is indicated in the report responsible for the designation,” such as the *Finest Lakes* study to be addressed below. Palmer also struggles with the criterion for “existing character of surrounding area” (Criterion B). He observes that the Legislature ironically was explicit on what was *not* to be considered (the traditional “fits harmoniously into the exiting natural environment” standard), but he is at a loss to know exactly what is supposed to be considered. “[P]erhaps it is whether perception of the landscape’s character type is significantly changed,” he speculates.” On the “expectations of the typical viewer” (Criterion C), he “question[s] the appropriateness” of the standard because of the inaccuracy of viewer expectations and because “viewer expectations change in reaction to changed circumstances.” On the “purpose” and “context” of the wind energy development (Criterion D), Palmer speculates that the Legislature may have had in mind a cumulative impact analysis. In support of this interpretation, he observes that such an analysis is important because the “greatest impact comes from the initial wind turbines built in an area; additional turbines will add a smaller incremental scenic impact, making it difficult to determine where to stop further development.” On the “effect... on the public’s continued use and enjoyment of the scenic impact” (Criterion E) Palmer asks whether “an Adverse scenic impact is Unreasonable if turbines are only visible from a rarely visited viewpoint, or is visible only to people engaged in an activity for which scenic quality is central to its enjoyment?” Finally, Palmer interprets the criterion of the “scope and scale of the ... effect of views of the generating facilities (Criterion F) as requiring an analysis

of whether the generating facilities “become dominating elements in the landscape,” which is one interpretation but begs the question of what is “dominant.”

After providing his interpretations of the statutory evaluation criteria, Palmer then overlays a six point outline for how the visual impact assessment should be structured: a project description, the landscape character, visibility analysis, identifying significant scenic resources, describing the public use and expectations, evaluating potential impacts and approaches to mitigation, each one containing its own set of particulars.

While Palmer’s efforts to define the evaluation criteria required by the Wind Energy Act are commendable, they also highlight the extent to which the evaluation criteria in 35-A M.R.S.A. §3452.3 constitute an unlawfully broad delegation to the DEP and LURC at least until one or the other of these agencies promulgates rules that afford protection against abuse of discretion. A private consultant should not be in the position to determine policy that is the responsibility of the Legislature in the first place and for an agency to implement legislative direction through rulemaking.

The vagaries of the statutory evaluation criteria for scenic impacts of wind energy developments are further illustrated by the nature of Palmer’s independent review of the scenic impact of the Project. His assessments are set forth in his *Review* at 36-51. The “overall scenic impact” for the ten places where the Applicant identified views from potential state or national significant scenic resources was heavily reliant on Criterion C (expectations of the typical viewer) and E (the extent, nature and duration of uses and the effect on continued use and enjoyment). The evaluation of these criteria, in turn, was heavily reliant on a survey of hikers over 2 days of a Labor Day weekend. The *Review* at 21 comments that the “information about public use (Criterion E), viewer expectations (Criterion C) and potential effect on public use

(Criterion E), is generally not based on documented data, even at state and nationally significant resources.” Palmer commends that Applicant for contracting for a survey of hikers at Mount Blue, *id.* and *Review* at 53, but then is critical of the survey:

[T]he survey only addressed one type of user (hiker, at one distance from the project (7.4 miles), for one type of scenic resource (mountain summit in a state park). There is little or no information about the scenic sensitivity to grid-scale wind power projects for other users (e.g., people fishing, boating, swimming, ice skating, skiing, attending an outdoor an outdoor interpretive program, stopping at a scenic turnout, or using a historic site) at closer distances, and other types of scenic resources. **Future VIAs need to increase knowledge about how grid-scale wind energy projects effect the expectations, scenic perceptions, enjoyment and likelihood to return for a greater variety of scenic resource users, at different distances, and in a variety of significant scenic resources.** [Emphasis original.]

Also see, Review at 34 (“The study sample is small, making it marginal for conducting the simple tests reported in this review,” but it “illustrates the type of analysis that *might* be performed to address the Wind Energy Act’s Evaluation Criteria.”[Emphasis added] Palmer continues:

The major limitations of the study are that it is limited to one significant scenic resource (Mount Blue), the sample size is small (22 interviews), the same procedure is not simply random (all adults were invited to interview and 20 percent refused for unknown reasons), and it did not sample days throughout the recreation use season (Sunday and Monday over Labor Day weekend).

Notwithstanding these highly critical comments on a market study that lay at the heart of the VIA for this Project, there were no rules or even guidance documents to measure the study against. There is not even a requirement that there be a market study. Hence the VIA was approved based on highly conclusory and ultimately subjective assessments of the visual impact of the Project.

Critical and unique scenic resources in this State, significantly defining its identity, are at stake in the process of wind turbine siting. Without rulemaking rendering the broad evaluation criteria specific and objective, the statute is too vague to permit meaningful review, violating the Separation of Powers Clause of the Maine Constitution.

B. The Wind Energy Act Creates an Unconstitutional, Irrebutable Presumption that only Great Ponds Listed in the Maine's Finest Lake Study Qualify as Scenic Resources of State Significance.

The Applicant's VIA, accepted by the DEP, excludes consideration of the scenic impact of the Project on Webb Lake. The reason for this is that 35-A M.R.S.A. §3452.1 limits visual impact assessments for wind energy developments to "scenic resources of state or national significance." "Scenic resources of state or national significance" are defined in 35-A M.R.S.A. §3451.9.D to include "Great Ponds," which Webb Lake is, but only if the lake is one of the 66 great ponds identified in the *Maine's Finest Lake* study (the "*MFL Study*") published by the State Planning Office in 1989 as having "outstanding or significant scenic quality." <http://www.maine.gov/doc/mfs/windpower/pubs/pdf/Maine's%20Finest%20Lakes.pdf>. Webb Lake is listed in *MFL Study*, but not one of the 66 that is classified as having outstanding or significant scenic qualities. This statutory scheme is arbitrary and discriminatory, on its face and as applied in this case, for the following reasons.

The *MFL Study* adopted for the organized towns in the State the same categories and standards used by the *Maine Wildlands Lake Assessment* for the unorganized territories. *MFL Study* at 28. Four classes of lakes are identified: IA is the highest classification and a lake qualifies if it has multiple "outstanding" natural values (designated with an "O") or one outstanding and four or more "significant" values (designated with an "S"). IB is the next lower classification and must have a single outstanding natural value to qualify. The next lower

classification is class 2, which has no outstanding values but at least one significant resource value. The lowest class is 3, which is for lakes with no known outstanding or significant qualities. *Id.* By its own terms this rating system, as applied, was incomplete and not necessarily accurate. The *MFL Study* at 29 makes a disclaimer – indeed it is stated to be “important to note” – that the study:

relied heavily on exiting information to rate lake resource features. *Due to the large number of lakes in the state, as well as the relative lack of field surveys on these lakes, it is quite possible that some important features have been overlooked. Because of this, these lake ratings should be regarded as minimal findings.* Some class 3,2 or 1B lakes may be more significant than their ratings indicates. [Emphasis added.]

For purposes of assessing the scenic impact from wind energy developments on lakes, as set forth in 35-A M.R.S.A. §3452, only a portion of the *MFL Study* is used. Whereas the *MFL Study* assesses several different kinds of natural values for its ratings, including wildlife, fisheries, shore land, etc., the definition of a scenic resource of state significance in 35-A M.R.S.A. §3451.9.D.1 narrows the focus to only those lakes that are listed in the *MFL Study* as having “outstanding or significant *scenic* quality.” The rating methodology and the standards used to assess scenic quality are described in the *MFL Study* at 15-16 and 202-205. The disclaimer quoted above concerning the completeness and accuracy of the study is particularly important for the rating in the *MFL Study* of scenic values because the study further discloses at 202 that “[t]here currently exists no base of consistent published or unpublished information on Maine’s lake scenic values.” Scenic values were assessed primarily with topographical maps. Budgetary constraints allowed observation of only 2300 lakes with a float plane. *MFL Study* 202-3.

The results of the assessments of scenic qualities are set forth in the *MFL Study* at 23,

where it is stated that there were 26 lakes of outstanding scenic quality and 40 lakes of significant scenic quality. The lakes so identified are listed with their ratings in Appendix D of the *MFL Study*. Webb Lake is listed on page 30 of Appendix D of the *MFL Study* as having an “S” for Shoreline quality, an “S” for Fisheries and an “O” for Wildlife, but a blank for Scenic. The *MFL Study* explains at page 221 that a “blank indicates that either the lake did not meet the study’s minimum standards for the particular resource **or there was inadequate information to draw conclusions.**” [Emphasis added.]

The bottom line is that Webb Lake is not one of the 66 lakes identified in the *MFL Study* as having outstanding or significant scenic quality but, according to the *MFL Study* itself, the absence of such a designation does not mean that it lacks the qualities of lakes that were listed. It may well mean that there was not a sufficient budget to adequately evaluate this particular lake. In fact FMM’s expert, Michael Lawrence, in his report dated October 4, 2011, Exhibit 3 to the October 4, 2011 Objections to the Draft DEP Order, has taken the criteria for assessing scenic qualities in the *MFL Study* and, after visiting and studying the lake, has concluded that Webb Lake does in fact meet the criteria used in the *MFL Study* to create the list of 66 lakes having “outstanding or significant scenic quality” and should have been on that list.

Because of the limitations acknowledged in the *MFL Study* itself, the Legislature never should not have created an irrebutable presumption that a lake was not worthy of protection from the adverse visual impact of wind energy developments just because it did not make the list of 66 such lakes designated in the *MFL Study*. It would have been permissible for the Legislature to create a presumption that a lake on the list should be protected or a presumption that a lake not on the list is not worthy of protecting, allowing in the latter case for proof overcoming the presumption based on the rating standards used in the study. But to make the list in the study

conclusive was arbitrary, capricious and irrational. As such it violates the Equal Protection Clause of the United States and Maine constitutions. The Aggrieved Parties have standing to bring Equal Protection claims. *See, National Parks Conservation Association v. Norton*, 324 F.3d 1280, 1241-44 (11th Cir. 2003). On its face and as applied, the statutory limitations on which lakes are to be protected from wind turbine projects fail to meet the rational relations test. Those who use and enjoy some of the lakes in the organized towns not on the list are treated differently from those who use and enjoy lakes in the organized towns that are on the list. For the Legislature to mandate this distinction based solely on a study done 22 years ago that acknowledges that it is not complete or accurate is so irrational, arbitrary and capricious as to be unconstitutional under the Equal Protection Clause. *See, National Parks, supra*, 324 F.3d at 1245-6; *Friends of Lincoln Lakes*, 2010 ME 18, ¶¶25-30, 989 A.2d 1128, 1136-38; *Town of Frye Island v. State*, 2008 ME 27, ¶14, 940 A.2d 1065, 1069.

C. The Visual Impact Assessment is Deficient Because it does not Consider the Visual Impact of the Project by those Using the Mount Blue State Park to Access Webb Lake.

The Applicant's VIA excludes any assessment of the impact of the proposed Project for those who use Mount Blue State Park, which is a scenic resource of state significance, to access Webb Lake for the reason that Webb Lake itself is not a scenic resource of state significance and is not within the boundaries of the Park. The DEP Order accepts this view.

The Aggrieved Parties challenge this limitation on the scope of the visual impact because it ignores the significance of the Park for one of its most popular features—access to Webb Lake. The official brochure for Mount Blue State Park published at http://www.maine.gov/cgibin/online/doc/parksearch/search_name.pl?state_park=18&historic_site=&public_reserved_land=&shared_use_trails=&option=search features water access. It states

that:

Mt. Blue State Park is Maine's largest state park, encompassing approximately 8000 acres in two sections separated by Webb Lake. A campground in the Webb Beach section has 136 wooded sites a short walk from a sandy beach and picnic area. Visitors can swim, launch and rent boats, and walk on the trails near the lake. During the summer months, park staff routinely offer canoe trips, walks and nature program.

Given the weight that the Bureau of Parks and Land gives to water access to Webb Lake from the Park, and further given the fact that scenic impacts are experienced by people not places, the overly technical approach used by the Applicant to scenic impact is erroneous.

The limitation of the visual impact assessment excluding the portions of Webb Lake used by those gaining access through the Mount Blue State Park also contradicts the plain wording of the statute. Section 35-A M.R.A. §3452.1 of the Wind Energy Act requires an assessment of the effect of a wind power development, not only on the scenic character of a place, but of "*related existing uses*" as well. Indeed the very title of this statute requires "related existing uses" to be assessed: "**§3452. Determinations of effect on scenic character and related existing uses.**" The body of Section 3452.1 specifies that the primary siting authority shall determine whether a wind power development project "significantly compromises views from a scenic resource of state or national significance such that the development has an unreasonable adverse effect on the scenic character *or existing uses related to scenic character of the scenic resource of state or national significance.*" [Emphasis added.] The views of those visiting Mount Blue State Park to gain access to Webb Lake are certainly an "existing use related to" Mount Blue State Park. Yet the Applicant's VIA excludes consideration of these related existing uses. Further, in the "evaluation criteria" set forth in Section 3452.3.E, an applicant is required to take into consideration the "extent, nature and duration of potentially affected public uses of the scenic

resource of state or national significance and the potential effect of the generating facilities' presence on the public's continued use and enjoyment of the scenic resource" Clearly, use of Webb Lake accessed as part of fee for using Mount Blue State Park is a "public use" of the Park and the presence of wind turbines on Saddleback Ridge will have an effect "on the "public's continued use and enjoyment" of the Park while swimming and boating from the Park's facilities, all within the meaning of Section 3452.3.E. Therefore, it was error for the DEP Order to accept the Applicant's VIA that excluded any assessment of the visual impact on the portions of Webb Lake used by those visiting the Park.

D. The Visual Impact Assessment is Deficient with regard to the Scenic Impact of the Transmission Lines, Associated Facilities and Other Features.

The Wind Energy Act, by enacting 35-A M.R.S.A.3452.1, requires an assessment of the whether a "*development*" will significantly compromise views from scenic resources of state or national significance." [Emphasis added.] . A "development" consists of "generating facilities" and "associated facilities." The "generating facilities" consist of the wind turbines, towers and the transmission lines (other than generating lead lines). 35-A M.R.S.A.3451.5. The "associated facilities" include everything else, including, but not limited to, buildings, access roads, generator lead lines and substations. 35-A M.R.S.A.3451.1. On April 8, 2011, LURC issued a Second Procedural Order in the Highland Wind Project case that associated facilities also include the "turbine pads, which are cleared, leveled areas of gravel around each turbine." See Exhibit 6 to the October 4, 2011 Objections to the Draft DEP Order at 3.

1. Deficiencies in the Assessment of Transmission Lines.

Section 3452.1 requires that the scenic impact of both the generating facilities and the associated facilities must be assessed under the Wind Energy Act before a license can be granted.

In this case, the transmission lines were not assessed for their scenic impact and the associated facilities were generally described but not assessed by the Applicant and the failure of the Applicant was accepted by the DEP over the objections of the Aggrieved Parties.

The Project Description in the Applicant's VIA at 9 includes a description of the transmission lines. It says that power from the turbines will be collected by a 34.5 kV underground collector system buried along the ridge road and then go above ground 900 feet down the access road and stay above ground until the last 1,340 feet of the access road. Then it will go underground to follow Winter Road, and then go above ground again to the new substation at Canton. The portion of the above ground transmission line beginning at Route 2 and heading south will be located within a 60 to 100 foot cleared corridor. There will be significant cutting for the transmission lines, which will be erected on highly visible H frames that are typically 65-80 feet high. The VIA claims that the "transmission line will not be visible from any scenic resource of state or national significance." *Id.* However, the DEP's Consultant, James Palmer, in his *Review* comments that the "[c]urrent practice has been to only evaluate visibility of the turbines, but the transmission lines must also be considered." *Review* at 6. Specifically, Palmer continues:

The text [of the Applicant's VIA] indicates that the analysis would "determine where any part of the turbines, access roads, or transmission line may be visible. *However, only turbine visibility is shown on Maps A and B. There is no indication that the transmission line, which is a "generation facility," was considered in the analysis. In addition, the required 3 mile study area around the transmission line extends beyond the 8 mile study for the turbines.*

Review at 9. [Emphasis added.]. Based on these comments, the DEP should not have accepted the Applicant's VIA.

2 Deficiencies in the Assessment of Associated Facilities

Nor did the Applicant's VIA comply with the law in terms of the assessment of "associated facilities." The Applicant's VIA at 8-10 describes some of the associated facilities of the Project. These include the 9, 625 foot ridgeline road that will connect the turbine foundations. Initially the gravel road will be 32 feet wide to accommodate cranes during construction and after construction the road will be reduced to 12 feet. In addition, associated facilities will include an 8,880 access road extending from Winter Hill Road to the Saddleback ridgeline. The road will be 24 feet wide during construction, with pull outs, later reduced to 12 feet. These roads include laydown areas and turn outs for the crane assembly, trucks and workers, which requires clearing of huge swaths of land. The associated facilities also include a cleared and level pad area of approximately 2 acres at the base of each turbine and additional clearing may be necessary in some areas for cut/fill slopes. There is no visualization of any of these associated facilities in the Applicant's VIA.

More importantly, there is also a fundamental flaw in how the DEP treated, or more accurately, failed to treat associated facilities as part of its determination of the visual impact of the Project. The Wind Energy Act, in enacting 35-A M.R.S.A. Section 3452.2, requires the DEP to undertake a separate visual impact analysis for associated facilities to determine whether they should be assessed under the "traditional," more restrictive standard, that existed before the Wind Power Act, namely, whether the development "fits harmoniously into the existing natural environment" as provided by 38 M.R.S.A. §484.3. The thread of that analysis is explained in a recent Procedural Order issued by LURC in the Application of Champlain Wind LLC for the Bowers Wind Project on April 11, 2011,

(<http://www.maine.gov/doc/lurc/projects/Windpower/FirstWind/Champlain/Development/Applic>

ation/ProceduralOrder/BowersMtn_ProceduralOrder2.pdf, attached hereto as *Exhibit A* (the “Bowers Order”). The first step is for the “primary siting authority” (here the DEP) to apply the scenic impact standard set forth in 35-A M.R.S.A. §§3452.1 and .3 to the associated facilities. Bowers Order at 4. This would restrict the visual impact analysis to scenic resources of state or national significance and would consider whether the associated facilities would have an “unreasonable adverse effect on scenic character on such scenic resources.” *Id.*² Then Section 3452.2 directs the primary siting authority to consider whether the application of the new Wind Energy Act standard, as opposed to the more environmentally protective standard in 38 M.R.S.A. §484.3 “(harmoniously fits)”, “*may* result in unreasonable adverse effects due to scope scale, location or other characteristics of the associated facilities.” Section 3452.2. {Emphasis added.} *Id.* This second step of the analysis requires the DEP to take into consideration two factors that are different than the Wind Energy Act standard. First the DEP would consider *locally significant* scenic resources (such as Webb Lake) and second, the standard is whether the associated facilities would fit harmoniously into the natural environment. *Id.* “[U]nder this analytical framework, the [DEP] must ultimately consider whether (because of their scope, scale, location or other characteristics) the associated facilities may result in (because the above two factors would not be taken into consideration) unreasonable adverse effects.” *Id.*

In the Highland Wind LLC Application, LURC found that the exception would apply, requiring the scenic impact analysis associated facilities to take place under the pre-Wind Energy Act standard. http://www.maine.gov/doc/lurc/agenda_attach/050411/MinutesDRAFT040611.pdf In this case the DEP never made a determination required by Section 3452.2. *See* email from

² The Bowers Order points out that there is no mileage limitation on the scenic impact of associated facilities under either the old or the new standard. *Id.* The Wind Energy Act limitation on mileage in Section 3452.3 only applies to “generating facilities” not “associated facilities.”

Project Manager Mark Margerum, dated October 13, 2011, attached hereto as *Exhibit B*, which qualifies as supplemental evidence under the DEP Procedural Rules, 06-096 ch. 2, Section 24.B because it came into existence after the DEP Order was issued.³ Accordingly, the DEP Order in this matter is invalid for this reason alone.

The absence of the determination is critical, because if the exception in Section 3452.2 applies, the VIA must take into account the visual impact of the associated facilities on scenic resources of *local significance*, especially Webb Lake, in addition to scenic resources of state or national significance. This was not addressed at all in the Applicant's VIA. The ridgeline road and the access road could and probably will have a substantial, adverse visual impact on Webb Lake if properly assessed. The roads are steep and they are "super-elevated roads," meaning that they are raised and are built with rock and fill required for downslope elevation. The roads will be most visible beginning at Tower 3 and from there to Tower 12. Details of the ridge roads and the access roads and their potential for adverse visual impact are found in Exhibit 1 as part of the Application. See:

- C201-29. New road branching off Winter Hill Road to the Operation and Maintenance building with a 12.45% grade (very steep.) A "cut" of 10 feet and a "fill" of up to 20 feet relative to the existing surface level are required to maintain road grade.
- C202-29. Shows a significant cut of 18 feet into hill side and fill of 20 feet +/- in and around wetland marker AW2. The road is super steep at 12.99%. Maximum elevation of 1160 feet.

³ In Bowers, the Applicant argued that a determination after the 30 day period specified in Section 3452.2 would be untimely. However, LURC interpreted the 30 day period to be "directory, not mandatory." Bowers Order at 2, N. 1. The Aggrieved Parties in this appeal complained about the absence of a required determination as part of its objections to the Draft Order. See the October 4, 2011 Objections to the Draft DEP Order. The DEP could have and should have taken a step back and undertaken the required analysis rather than summarily dismissing all of the objections of the Aggrieved Parties 2 days after they were filed.

- C203-29. Shows the super elevated road with a maximum grade of 12.87% with cuts into the mountain up to 25+/- feet. The elevation is at 1150 feet, causing the road to be visible for miles.
- C204-29. Shows a cut up to 20 feet into mountain with fill down slope of 30 feet, rising to an elevation of 1250 feet. The grade is 12.72%.
- C205-29. Shows a cut up to 20 feet into mountain with fill of 20 feet downslope, with a grade of 13% a steep grade, rising to 1390 feet in elevation.
- C206-29. The road is steep with elevation reaching 1520 feet.
- C207-29. The fill for the road is up to 20 feet, with a steep grade of 12 to 13%, an example of a super elevated road design, with elevation to 1640 feet.
- C208-29. Shows a cut for a road up to 20 feet, with side slope fills of twenty feet for stabilization. The road is steep, 13% grade, with elevation maxing at 1750 feet.
- C209-29. Turbine 1 elevation is 1595.6 feet, Turbine 2 elevation is 1632 feet, and the road spur to Tower 2 has a cut of 20 feet, up to a 12.99% grade and a cut into mountain of 10+ feet for width requirements. This is a good example of a super elevated road. Crane pad area is cleared is 50 by 80 and is leveled by fill. The elevation at 1680 feet.
- C210-29. Shows the road to Turbines 3 and 4 having fills of 20 feet. The proposed re-vegetated area is significant due to clearing. Turbine 3's elevation is 1753 feet.
- C211-29. Shows the road to Tower 4, with fill of 20 feet and a huge laydown area to be cleared at 1820 foot elevation. Tower 4 elevation is 1824
- C212-29. Shows Tower 5 elevation is 1890 feet. Fill for the road downslope is up to 20 feet.
- C213-29. Shows the road to Tower 6 to an elevation of 1882.4 feet. Fill around tower is 20 to 30 feet with cuts of 10 feet to level out. Laydown Area B elevation is 1880 to 1900 feet. Tower 7 has a laydown area cleared of 200 by 200 feet, requiring 8 feet of cut to level.
- C214-29. Shows the cut for the road up to 15 feet along with fill on both sides of the road to stabilize road with a grade of 13%. Elevation is to 1970 feet.
- C215-29. Shows the road to Tower 8 splits from ridge road, with a 12.99% grade with fill of 10 feet. There is filling around the tower pad up to 25 foot downslope for stabilization. The elevation at Tower 8 is 2028.6 feet
- C216-29. Shows the road to Tower 9 with cuts 5 to 8 feet for consistent grade downhill of 11.68%.
- C217-29. Shows Tower 9 elevation at 2017 feet, with side slope for the road up to 20 feet to keep a constant grade.
- C218-29. Shows the road to Tower 10, with elevation at 2000, with fill up to 30 feet on side slopes and significant clearing.

- C219-29. Shows Tower 11 elevation to be 2021 feet with 20 feet of fill on side slopes. Up to 12.5% grade for short distance. Truck turn around 100 by 100 feet cleared and cut of 8 to 10 feet to level with significant clearing.
- C 220-29. Shows Tower 12 elevation is 2107 feet with 10 foot cuts to maintain grade of road at 13%. Fill areas up to 10 feet creating super elevated roads.
- C302-29 shows the road to the substation, elevation around 550 feet with 12.92% grade and fill areas up to ten feet to stabilize road. Sub- Station has significant fill down slope up to 50 feet.

In Exhibit 1, C409-29, the Applicant admits that there will be scenic impact from the ridge and access roads. There is a Note at this drawing that states the developer will remove 4 inches of gravel from the shoulder and add erosion control mix in its place to promote natural vegetation of native species. It further states that the vegetation will be cut back on an annual basis *except for the sensitive view sheds*. The exception is an admission of impact and the proposed screening should not be assumed for purposes of evaluating the scenic impact, as discussed below.

3. Other Deficiencies in the Applicant's VIA

The Applicant's VIA is also deficient to the extent that it relied on the hiker survey of Market Decisions dated September 10, 2010 attached as Attachment C to the Applicant's VIA for all the reasons stated above by the DEP's consultant, James Palmer, **described at ---- above**. The ultimate assessment of the Project's visual impact relied so heavily on this survey that the deficiencies in it invalidate the VIA for licensing purposes.

In addition, VIA fails to assess the visual impact of the Project from the standpoint of a "worst case" views. The DEP visual impact consultant, James Palmer, explains the importance of using "worst case" views at 7 of his *Review*:

Accurate visual simulations are particularly useful when conducting [an evaluation of potential visual impacts]. The selection of viewpoints for the visual simulations is frequently

a source of controversy. Opponents are likely to want simulations that represent the “worst case” views, while the developer and other proponents will argue that “typical views” provide a fairer representation. Worst case views are closer, show larger portions of the project, represent situations where the project appears less compatible with its surroundings. Typical views normally do not show the project at its worst, but are viewpoints that might have many viewers, or are selected to represent a diversity of viewing conditions (e.g., distances from the project, type of screening, and levels of compatibility). It is very unusual for a scientific method (i.e., random sampling) to be used to select the typical viewpoints – normally they are simply declared “typical” by the analysis. Both types of simulations are useful to decision makers. However, it is difficult to imagine why they would not want to be aware of worst case situations.

The Applicant's VIA mentions “worst case” views only once at 4, stating that worst case photographs were taken “where possible.” Palmer, on the other hand, comments on the absence of worst case views in the Applicant's VIA throughout his *Review*. See *Review* at 6 (visibility analysis with screening should be “used with caution and carefully field checked, since vegetation data can change quickly”), 8 (he would limit screening vegetation to only three forested classes), 21 (“Much more effective use can be made of the photosimulations when addressing the Evaluation Criteria. It is important that a ‘worst case’ view from each state or nationally significant scenic resource be evaluated, and a simulation prepared if there is the potential view of the generating facilities.”), 24 (“It is frequently argued that accounting for the screening effect of forest cover provides a more realistic assessment of a wind project's visibility. *Approximately 13 percent of the study area has a potential to view of a turbine tip* if one assumes the a [sic] screening effect from assigning a height of 40 feet to deciduous, evergreen and mixed forest land cover types. TJD&A also assign screening effects to harvested areas that have significantly less canopy closure, as described in section 2.3 Visibility Analysis. The visibility analysis using these screening assumptions from the VIA indicate that *only 3*

percent of the study area has potential views of blade tips. This difference demonstrates that assumptions about screening – what land cover types to include and what heights to assign them – can significantly affect the results of a visibility analysis. This is the reason that we caution about relying heavily on the results of a visibility analysis using forest screening to make decisions about visual impacts. **Potentially worst case viewpoints at all state or nationally significant scenic resources need to be investigated in the field, and should also be investigated through geometrically accurate visual simulations.**” [Bold original.] Following these comments, Palmer’s *Review* at 24 sets forth in Table 4 significant discrepancies between the potential views of the turbines against the significantly lower visibility accounted for in the VIA. Table 5 in the *Review* at 26 shows in addition, some discrepancies between worst case views and the views of from state resources of significance. It is unclear from the *Review* as a whole whether the VIA investigated worst case views with “geometrically accurate visual simulations, but it is quite evident from Palmer’s *Review* that he was concerned about the adequacy of the VIA in this respect. The Aggrieved Parties share that concern.

Based on Palmer’s *Review*, the Applicant’s VIA is also deficient in a number of ways relating to the impact of the Project on Mount Blue State Park and Halfmoon Pond. Palmer comments that the conclusions in the VIA about the Mount Blue hiking trail about “scope and scale” are made without reference to the survey and that the overall conclusions were not consistent with the survey results. *Review* at 15-16. On the effect of the Project on Center Hill Ledge in the Park, Palmer comments that there is little support for the overall conclusion about the absence of adverse visual impact other than the fact that the turbines are far away and occupy a small part of the total visual field. *Review* 17. On the Farmhouse Turnout at the Park, Palmer opines that the VIA conclusions are “only supported by assumptions.” *Review* at 18. As to the

Webb Lake Campground in the Park, Palmer opines that the VIA lacks analysis of user expectations and use. *Review* at 19. As to the impact on Halfmoon Pond, Palmer states that it is unclear how the VIA reached a conclusion of the absence of an adverse impact. *Review* at 20. Based on all these deficiencies noted by the DEP's own consultant, the DEP should not have accepted the Applicant's VIA.

E. The Scenic Impact Analysis is Deficient Because it does not Adequately Address Cumulative Effects.

The Wind Energy Act does not expressly require a cumulative impact analysis, but the DEP's consultant correctly opines that such an analysis should be required because of the wording of 35-A M.R.S.A. §3452.3.D (evaluation criteria should include the "context of the proposed activity"). *See Palmer, Review* at 4 and 52. More to the point, DEP Rule 06-096 Ch.372 (Policies and Procedures Under the Site Location Law) in Section I.A specifically requires an analysis of "cumulative impacts of the development on the area likely to be affected by the proposed development." The Wind Energy Act modified 38 M.R.S.A. §484 standards under the Site Law, but there is no legislative expression that the general policies and procedures under the Site Law, as expressed in Chapter 372, were intended to be removed for wind energy developments. *Also, see*, the DEP "Guidelines for Assessing Cumulative Impacts to Protected Natural Resources under the Natural Resources Protection Act"

<http://www.maine.gov/dep/blwq/docstand/nrpa/sopcumimpact.pdf>

The Applicant's VIA made no cumulative impact analysis. On April 13, 2011, Project Manager Mark Margerum requested the Applicant to address this issue in terms of wind projects that have been approved, or for which applications have been submitted, and in terms of other projects the Applicant might be planning in the vicinity of the proposed Project. The Applicant

responded on April 27, 2011 in a letter that is posted on the DEP website, identifying two other approved wind projects (Record Hill and Spruce Mountain) and three projects being considered in the vicinity (one by First Wind in Rumford and two by the Applicant in Dixfield and Canton). The Applicant accompanied the response with a mapping overlay of the proposed Project with the Record Hill and Spruce Mountain projects only. No further analysis was given and no effort was made to depict the location of the other three potential projects.

The Aggrieved Parties objected to the Draft Order in this case on the grounds of the inadequacy of the cumulative impact analysis. The response in the DEP Order appealed from to this objection was: "The Department finds no statutory basis to assess these potential impacts without reference to a scenic resource of state or national significance in accordance with Title 35-A §3452." DEP Order at 23. The Aggrieved Parties do not understand this comment as they simply objected to the absence of a meaningful cumulative impact analysis and never asked the DEP to do so "without reference to a scenic resource of state or national significance." The record contains no more than a map showing the geographic relationship of the licensed Project with Record Hill and Spruce Mountain. It contains no cumulative impact analysis of the combination of these projects and no mention at all of how the licensed Project may impact other proposals referenced but not analyzed. As pointed out in his *Review*, the DEP needs to consider the impact of an initial project on the future development of the region, a region that contains a critical resource of state significance (Mount Blue State Park):

The greatest impact comes from the initial wind turbines built in the area; additional turbines will add a smaller incremental scenic impact, making it more difficult to determine where to stop further development. It may be most responsible to consider potential cumulative wind development impacts to an area as part of the initial proposal.

Review at 4. The DEP followed this advice only in the most superficial and legally deficient manner, giving only lip service to the concept of cumulative analysis. It gave no analysis whatsoever to prospects that approval of the Saddleback Ridge Project may be the harbinger for more wind projects in the future degrading the importance of Mount Blue State Park. This is a critical part of a cumulative impact analysis. *See, the United States Environmental Protection Agency's Consideration of Cumulative Impacts in EPA Review of NEPA Documents*, Exhibit 8 to the October 4, 2011 Objections to the Draft DEP Order. According to this document, there are a number of inquiries that should be made:

1. the proximity of the projects to each other either geographically or temporally;
2. the probability of actions affecting the same environmental system, especially systems that are susceptible to development pressures;
3. the likelihood that the project will lead to a wide range of effects or lead to a number of associated projects; and
4. whether the effects of other projects are similar to those of the project under review;
 1. The likelihood that the project will occur....;
 2. temporal aspects, such as the project being imminent.

Id. at 11-12. As part of this analysis, the EPA document stresses the importance of identification of future actions is important. "The critical question is 'What future actions are reasonably foreseeable?' Court decisions on this topic have generally concluded that reasonably foreseeable future actions need to be considered even if they are not specific proposals." *Id.* at 13. *See also*, the Council on Environmental Quality definition of cumulative impact at 40 CFR §1508.7. The DEP did not pursue or address any of these issues.

After the Draft Order was issued and circulated for comment, the DEP's consultant

returned to the issue of cumulative impacts, explaining that the issue presents a “conundrum.” September 30, 2011 Comments on the Draft Order at 2, set forth on the DEP website as “Review Comments.” Palmer points out that the Wind Energy Act focuses on specific resources, but there is a need to evaluate multiple viewpoints from those traveling through an area of state or national significance “as a continuous experience.” There is also a need to evaluate the cumulative impact of multiple projects, as he earlier commented and as emphasized by the EPA. He opines again that such consideration fall within the scope of the Wind Energy Act’s evaluation criteria. The advice fell on deaf ears. LURC has been attempting to examine these issues, Palmer adds; the DEP needs to do so as well. *Id.*

The Mount Blue State Park and the surrounding view shed is a critically important area of the State to preserve for its outstanding scenic beauty. It deserves more analysis than the Applicant or the DEP has given to it.

I. OBJECTIONS TO THE DEP BASED ON TANGIBLE BENEFIT PAYMENTS TO THE BUREAU OF PARKS AND LANDS.

The DEP Order states that Applicant has satisfied the requirement for demonstrating tangible benefits to the host community and surrounding area from the Project, as required by 35-A M.R.S.A. §3454, provided that the Applicant makes a \$60,000 payment to the Maine Bureau of Parks and Lands for land acquisition projects in the area. DEP Order at 46. The Aggrieved Parties object to monetary payments to state government as part of the permitting process. In the Bowers case, handled by LURC, the Commissioner of the Department of Conservation, William Beardsley, announced a policy of his Department not to accept tangible benefit payments from wind project developers. *See*, Memorandum and Third Procedural Order in the matter of Bowers Wind Project, at 10,

http://www.maine.gov/doc/lurc/projects/Windpower/FirstWind/Champlain/Development/Application/ProceduralOrder/BowersMtn_ProceduralOrder3.pdf. However, On October 3, 2011, the Acting Deputy Director of the Bureau of Parks and Land informed the Project Manager for the Project in this case in an email that the “DOC would be happy to accept any contributions from the developer for land protection efforts in this area.” It is unclear whether the DOC policy has changed, but if it has, then the DEP should not follow it. Monetary contributions to state government to promote a licensing of an industrial wind project is wrong. It comes close to meetings the definition of bribery in 17-A M.R.S.A. § 602 (“a person is guilty of bribery in official and political matters if: A. He ...gives any pecuniary benefit to another with the intention of influencing the other's action, decision, opinion, recommendation, vote, nomination or other exercise of discretion as a public servant, party official or voter”) and should not be allowed.

The dangers of such contributions are highlighted in the Bureau of Parks and Lands review comments on this Project, dated December 10, 2010. BPL could have objected to the Project because of its management of nearby public lands and its objection presumably would carry considerable weight by the DEP in its review of the Project. Indeed BPL had several concerns about the Project set forth in its December 9 email. Yet in this email, the BPL did not ultimately object to the Project application and at the same time referenced proposed monetary contributions by the Applicant to BPL “above and beyond the requirements of the new law.” The email expressed a “policy concern” that wind power development might slow the progress for conservation issues. This “policy concern” logically relates to the issue of cumulative impact, which the Aggrieved Parties raise in this appeal. So it is concerning to the Aggrieved Parties that BPL saw the financial contributions offered by the Applicant in this case as something that would “tip the scale towards continued momentum” in relation to the policy concern. Likewise

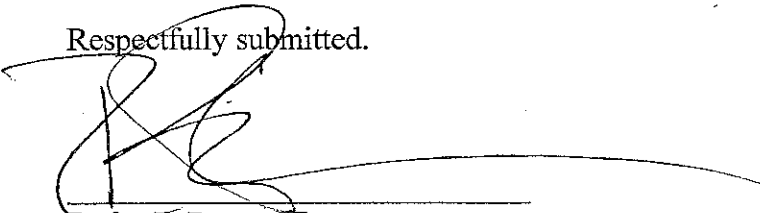
it is of concern that BPL needed to explain that the acceptance of the Applicant's offering would come with "no implied or actual endorsement of the project or application." In any event, Maine law specifies that only the Governor has the authority to accept a gift to the State, not any agency or other governmental official. 2M.R.S.A. §5. There is nothing in the record reflecting an Executive Order authorizing the gift proposed in this case.

REQUEST FOR RELIEF

The Aggrieved Parties request the Board to void the DEP Order and order a public hearing on the noise and the visual impact issues before an impartial hearing officer, independent of the DEP. It has been demonstrated that there is "credible conflicting technical information regarding licensing criteria" as required by the DEP Procedural Rule, Section 7.B. At a hearing, the Aggrieved Parties will present testimony from Richard James and Michael Nissenbaum, M.D., on noise issues consistent with their reports in this case, and will present testimony from Michael Lawrence on visual impact issues consistent with his report in this case and will offer rebuttal testimony based on testimony of the Applicant and its experts.

Dated: November 7, 2011

Respectfully submitted.


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*Attorney for Friends of Maine's Mountains
and the Other Aggrieved Parties*

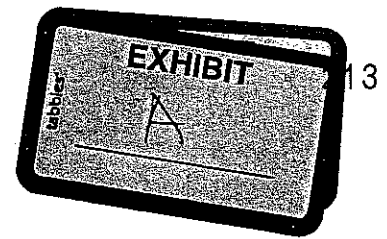
Saddleback Ridge Wind, LLC // Natural Resource Protection Act
(NRPA) and Site Location of Development Act applications

- Appellant Exhibit A
Land Use Regulation Commission --
Second Procedural Order (April 21, 2011)



PAUL RICHARD LEPAGE
GOVERNOR

STATE OF MAINE
DEPARTMENT OF CONSERVATION
22 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0022



WILLIAM H. BEARDSLEY
COMMISSIONER

Second Procedural Order

In the Matter of
Development Permit DP 4889
Champlain Wind, LLC
Bowers Wind Project
April 21, 2011

To: Parties

Neil Kiely (Applicant)
Juliet Brown, Esq. (Counsel for Applicant)
Sean Mahoney, Conservation Law Foundation (Intervenor)
Dylan Voorhees, Natural Resources Council of Maine (Intervenor)

Interested Persons

David Corrigan, Fletcher Mountain Outfitters
Steve Norris, The Pines Lodge
Kevin Gurall, PPDW
David R. Darrow
Pete Borden
Leonard J. Murphy
Barbara Moore
Gordon Mott
Andrew Buckman
Gary and Kay Campbell
Timothy Dalton
Paul Rudershausen
Tracy Allen
Phillip Daw
Daniel Remian

cc: Commissioners of the Land Use Regulation Commission (LURC)

Amy B. Mills, AAG
Catherine Carroll, LURC Director
Samantha Horn-Olsen, LURC Planning Division Manager
Fred Todd, LURC Project Planner
Jim Palmer, LURC Scenic Quality Consultant

From: Gwen Hilton, Land Use Regulation Commission Chair and Presiding Officer

Subject: Scenic standard applicable to associated facilities, 35-A M.R.S. § 3452(2)

I. Background.

LURC staff determined the Bowers Wind Project application was complete on March 14, 2011. Following the staff's determination, no interested person raised a concern regarding the scenic impact standard applicable to this project's associated facilities. On April 6, 2011, the Commission voted to set this matter for a public hearing, but no date has yet been set. In view of 35-A M.R.S. § 3452(2), this issue may arise at the public hearing, and fairness to all parties in this proceeding requires that a determination on the applicable scenic standard be made in advance of the pre-filing of testimony and the public hearing.¹ Therefore, on March 29, 2011 the Presiding Officer issued the First Procedural Order in this matter. That order sought filings regarding the scenic standard applicable to the associated facilities, and provided an opportunity to submit argument in advance of the Presiding Officer's determination on this scenic standard issue.

On April 6, 2011, two interested persons, David Corrigan and Kevin Gurall, submitted information regarding this scenic standard issue.² Mr. Corrigan of Fletcher Mountain Outfitters submitted a filing, arguing that this project stands at the head of the Downeast lakes region watershed – an area he states that the Legislature intentionally excluded from the area designated as appropriate for wind energy development. He states the economy of this region depends, in large part, on its wild character, and that in part is why the Downeast lakes region is home to perhaps the largest concentration of working Registered Maine Guides in the state. He further asserts that part of the Commission's duty is to ensure that existing, traditional uses will not be adversely impacted. By applying the higher scenic standard to the associated facilities, he states the Commission can ensure that that duty is fulfilled. Mr. Gurall, President of the Partnership for the Preservation of the Downeast Lakes Watershed, submitted a filing, generally arguing that the associated facilities of this project should be held to the higher scenic standard.

On April 12, 2011, the Applicant responded, arguing that the exception set forth in section 3452(2) regarding associated facilities is not applicable to this project's associated facilities, which are the access roads including the crane-path roads, the express collector line³, the substation, the operations and maintenance building, the permanent met towers, and the turbine pads or cleared areas around individual turbine locations.

The Applicant states the substation, the operations and maintenance building, and the express collector line are all located on the north side of the project ridge and, as such, would not be visible from any

¹ 35-A M.R.S. § 3453(2) states that the Commission "shall make a determination [regarding the scenic standard applicable to associated facilities] within 30 days of its acceptance of the application as complete for processing." The Applicant states that a determination after the 30-day period is untimely. The 30-day time period set by the Legislature for the Commission is directory, not mandatory. As stated above, a hearing date has not yet been set and testimony has not yet been pre-filed. There has been no showing that making the scenic standard determination now would be unfairly prejudicial to any party to this proceeding. Rather, deciding this issue before the pre-filing of testimony and before the hearing will lend itself to fairness as all parties will know the scenic standard applicable in this administrative proceeding before the matter is adjudicated before the Commission.

² The First Procedural Order required that any interested person file pleadings on this scenic standard issue no later than April 5, 2011. The two interested person filings on April 6, 2011 were, therefore, untimely. No party has objected or identified any unfair prejudice arising out of the filings being late, and therefore they have been accepted.

³ The Applicant assumes for the sake of discussion that the express collector line is an associated facility. This issue is discussed in more detail in the text below.

scenic resources of state or national significance (jurisdictional resources) because those resources are located to the south of the project. Further, the associated facilities would not be visible from the Springfield Congregational Church (which is on the National Register of Historic Places). The express collector line would only be visible from local viewing points where it crosses an existing road, Route 6. The potential visual impacts of the turbine pads, access roads, and all associated clearing is consistent with similar facilities (roads, buildings and substations) located throughout the rural Maine landscape. Finally, the Applicant asserts the potential visual impact of the permanent met towers will be minimal to both jurisdictional and local resources due to their narrow profile (18" wide) and their light color.

II. Order.

A. Definition of associated facilities

As a preliminary matter, to determine which scenic standard applies to the associated facilities in this project, the definition of associated facilities, as compared to generating facilities, must be clear. In accordance with 35-A M.R.S. §3451(1) and (5):

Generating facilities means wind turbines, including their blades, towers, and concrete foundations, and transmission lines (except the generator lead line) immediately associated with the wind turbines.

Associated facilities means all other facilities that are not generating facilities, and that includes the turbine pads, which are the cleared, leveled areas around each turbine, all roads used to access the turbines, the generator lead line, the meteorological towers, as well as the operations and maintenance building and the substation.

The transmission lines in this project require clarification with respect to whether certain lines are generating facilities or associated facilities. In this project, there are transmission lines that run between the turbines, collecting the power. Those transmission lines are immediately associated with the wind turbines and are generating facilities. In this project there is also, however, a so-called express collector line that runs for 5.2 miles from the summit of the project to the substation. The express collector line is not immediately associated with the wind turbines, is more like a generator lead line, and therefore is an associated facility. This project proposes no new generator lead line leaving the substation as power is transported from the substation to the power grid on an existing line.

B. Applicable scenic standard

Regarding the scenic standard applicable to associated facilities, the Wind Energy Act provides, in relevant part:

The [Commission] shall evaluate the effect of associated facilities of a wind energy development in terms of potential effects on scenic character and existing uses related to scenic character in accordance with Title 12, section 685-B, subsection 4, paragraph C . . . in the manner provided for development other than wind energy development, *if the [Commission] determines that application of the [Wind Energy Act scenic] standard . . . to the development may result in unreasonable adverse effects due to the scope, scale, location or other characteristics of the associated facilities.* An interested party may submit information regarding this determination to the primary siting authority for its consideration. The primary siting authority shall make a determination pursuant to this subsection within 30 days of its acceptance of the application as complete for processing.

35-A M.R.S. § 3452(2) (emphasis added). Thus, this section provides the Commission with an analytical framework as follows.

To determine which scenic standard to apply, § 3452(2) first directs the Commission to apply the scenic standard provided by the Wind Energy Act to the associated facilities. That scenic standard and its associated criteria are found at 35-A M.R.S. §§ 3452(1) & (3). In applying that standard, the Commission would consider views of the associated facilities only from scenic resources determined under the Wind Energy Act to be of state or national significance, and based upon the criteria set forth in the Act, it would consider whether the associated facilities significantly compromised those views such that there was an unreasonable adverse effect on scenic character or existing uses related to scenic character.⁴ 35-A M.R.S. §§ 3451(9), 3452(1) & (3). Upon this review, that is—the scenic impacts of the associated facilities under the Wind Energy Act standard—section 3452(2) then directs the Commission to consider whether the application of that standard, as opposed to application of the scenic standard set forth in Title 12, “may result in unreasonable adverse effects due to scope, scale, location or other characteristics of the associated facilities.” 35-A M.R.S. § 3452(2). Thus, the Commission must next consider what it would consider with regard to the scenic impacts of associated facilities under the Title 12 standard that it would not consider under the Wind Energy Act standard.

Under the Commission’s traditional scenic standard, 12 M.R.S. § 685-B(4)(C) and Commission Standards § 10.25(E)(1), the Commission would consider whether “adequate provision has been made for fitting the [project] harmoniously into the existing natural environment in order to ensure there will be no undue adverse effect on [among other things] existing uses [and] scenic character . . . in the area likely to be affected by the project.” Thus, under Title 12, the standard is the so-called harmonious fit/no undue adverse effect standard, and the Commission’s review of the scenic impacts of associated facilities would not be not limited to those views that have been identified by the Legislature as significant under the Wind Energy Act. See 35-A M.R.S. § 3451(9) & § 3452(1). Under Title 12 the Commission would consider the impacts the associated facilities would have on views from scenic resources of state or national significance as well as locally significant scenic resources in the area likely to be affected by the project.

Accordingly, if the Commission were to apply the Wind Energy Act standard to associated facilities, two factors are relevant for the Commission’s consideration. First, the Commission would not consider the scenic impacts of the associated facilities on locally significant scenic resources. Second, with respect to views of the associated facilities from scenic resources of state or national significance, the Commission would not consider whether the associated facilities fit harmoniously into the natural environment. Thus under the analytical framework provided by 35-A M.R.S. § 3452(2), the Commission must ultimately consider: whether (because of their scope, scale, location or other characteristics) the associated facilities may result in (because the above two factors would not be taken into consideration) unreasonable adverse effects.

C. Bowers Wind Project associated facilities

A review of the filings regarding the scenic standard applicable to the associated facilities of this project and the information contained in the administrative record to date, including the Applicant’s complete

⁴ The Wind Energy Act provides that the Commission “shall consider insignificant the [scenic] effects of portions of the development’s *generating facilities* located more than 8 miles . . . from a scenic resource of state or national significance.” 35-A M.R.S. § 3452(3) (emphasis added). Therefore, under the Wind Energy Act, there is no distance limitation on the Commission’s consideration of associated facilities’ scenic impact on scenic resources of state or national significance. It may be that parties have not addressed this issue as associated facilities may not typically be visible beyond 8 miles.

application, indicates the following with respect to the scope, scale, location and other characteristics of the associated facilities:

- Lakes located to the south of the project area in the Downeast lakes region (other than the lakes in this region that have been designated scenic resources of state or national significance under the Wind Energy Act) have been identified as locally significant scenic resources, but the views of associated facilities from these resources will be limited for the reasons stated below;
- There is no new generator lead line leaving the substation;
- The operations and maintenance building, substation, and express collector line will be located on the north side of the project area, and while the access road to the operations and maintenance building will be visible from an existing road, and the express collector line will be visible where it crosses an existing road, none of those associated facilities will be visible from any identified scenic resources;
- This project proposes 9.8 miles of new access roads in a project area that contains existing logging roads, the roads will be located at relatively low elevations, the topography will not require extensive cut and fill, and therefore the visual impact from the roads will primarily be limited to notches in the vegetation canopy;
- Elevations proximate to the project area are relatively low-lying and elevations that will provide views of the associated facilities will be at a distance that reduces the scenic impact; and
- This project's associated facilities may be visible to varying degrees from scenic resources that have been identified as significant under the Wind Energy Act, but they will not be visible from any national natural landmark, federally designated wilderness area, nationally-listed historic property, or national park.

In view of the scope, scale, and location of the associated facilities, as identified above, the Presiding Officer does not conclude that the application of the Wind Energy Act scenic standard to this project's associated facilities may result in an unreasonable adverse effect. With respect to other mountainous regions in the State of Maine under the Commission's jurisdiction, this project area and areas proximate to it are relatively low-lying, and the project area is located in a region with only moderate changes in elevation. Further, many of this project's associated facilities are located to the north of the project area, and thus the ability to view associated facilities from the southerly lakes of local and state significance is limited. Therefore, not considering the associated facilities' impacts to scenic resources that the Legislature has already determined as a matter of law to be insignificant with respect to the scenic impacts of the generating facilities, and not requiring a harmonious fit with respect to how the associated facilities will be viewed from scenic resources of state or national significance, will not result in an unreasonable adverse effect. For all of these reasons, the Wind Energy Act scenic standard, not the Title 12 standard, is applicable to the associated facilities of the Bowers Wind Project.

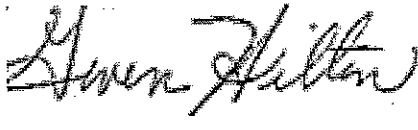
III. Authority and Reservations.

This Procedural Order is issued by the Presiding Officer pursuant to LURC Chapter 5, *Rules for the Conduct of Public Hearings*. All objections to matters contained herein should be timely filed in writing with the Commission but are not to be further argued except by leave of the Presiding Officer. All rulings and objections will be noted in the record. The Presiding Officer may amend this Order at any time.

Questions regarding these rulings of the Presiding Officer should be directed to Catherine Carroll, the Commission's Director, or Fred Todd at the Commission's office in Augusta. No *ex parte* communication may occur with the Presiding Officer or any other Commission member.

DP 4889, Second Procedural Order
Page 6 of 6

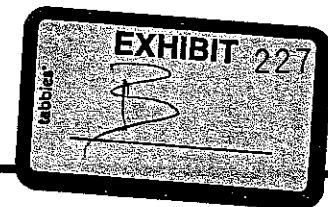
DATED AT AUGUSTA, MAINE THIS 21st DAY OF April 2011

By: 

Gwen Hilton, Chair and Presiding Officer

Saddleback Ridge Wind, LLC // Natural Resource Protection Act
(NRPA) and Site Location of Development Act applications

- Appellant Exhibit B
Email from Rufus Brown to Mark
Margerum (October, 2011)



Rufus Brown

From: Margerum, Mark T <Mark.T.Margerum@Maine.gov>
Sent: Thursday, October 13, 2011 11:16 AM
To: Rufus Brown
Subject: RE: Saddleback

Because the associated facilities are generally not visible from any scenic resource the Department applied the standards of the Wind Energy Act, section 3452 in evaluating the effects of the associated facilities. There is not a specific document memorializing the Department's decision to apply the Wind Energy Act, however the permit reflects that decision.

Mark Margerum
Maine Department of Environmental Protection
Bureau of Land and Water Quality
(207) 287-7842
Mark.T.Margerum@Maine.gov

From: Rufus Brown [<mailto:rbrown@brownburkelaw.com>]
Sent: Tuesday, October 11, 2011 2:14 PM
To: Margerum, Mark T
Subject: RE: Saddleback

Mark:

35-A MRSA §3452.2 provides that within 30 days of the acceptance of the application for a wind energy development, the DEP shall make a determination of whether the associated facilities may have an unreasonable adverse effect on a scenic resource of state or national significance. Did the DEP make that determination and, if so, can you send me a copy of it? Thanks..

From: Margerum, Mark T [<mailto:Mark.T.Margerum@Maine.gov>]
Sent: Tuesday, October 11, 2011 12:55 PM
To: Rufus Brown
Subject: RE: Saddleback

Yes, I was out of the office but they were delivered on Friday. Thank you.

Mark Margerum
Maine Department of Environmental Protection
Bureau of Land and Water Quality
(207) 287-7842
Mark.T.Margerum@Maine.gov

From: Rufus Brown [<mailto:rbrown@brownburkelaw.com>]
Sent: Tuesday, October 11, 2011 11:07 AM
To: Margerum, Mark T
Subject: Saddleback

Mark:

Did you get the hard copies of my documents last Friday?

Rufus E. Brown, Esq.

